IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 GKF-SAJ**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

DEFENDANT PETERSON FARMS, INC.'S SEPARATE RESPONSE TO STATE OF OKLAHOMA'S MOTION FOR PRELIMINARY INJUNCTION AND JOINDER IN DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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Defendant Peterson Farms, Inc. ("Peterson") submits its Response to the State of Oklahoma's Motion for Preliminary Injunction (Dkt. #1373) (hereinafter "Plaintiffs' Motion") and hereby joins in and adopts the arguments and positions set forth in Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction (Dkt. #1531) (hereinafter "Defendants' Memorandum") and separately states as follows:

I. INTRODUCTION

In their Motion, Plaintiffs urge the Court to enjoin the land application of poultry litter under RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), because—they contend—land application of poultry litter poses an "imminent and substantial endangerment" to the public health within the IRW based upon the purported presence of pathogenic bacteria. Plaintiffs' Motion and the relief sought therein are novel and significantly depart from every reported RCRA case which Peterson has been able to identify through its research. The novelty of Plaintiffs' Motion can be attributed to numerous factors, but two of those are worthy of additional comment. First and foremost, as noted in Defendants' Memorandum, RCRA simply does not apply to the allegations made in this case or to the beneficial land application of poultry litter as a fertilizer and soil amendment to agricultural properties in the Illinois River Watershed ("IRW") or elsewhere. On this point and those related to it, Peterson joins in and adopts the arguments and authorities set forth at length in Defendants' Memorandum.

Second, Plaintiffs' Motion is novel because the alleged site of contamination covers a massive geographical area owned by thousands of different people and/or entities who are not before this Court. Indeed, each of the named Defendants contract with a number of farmers within the watershed to raise poultry. Peterson contracts with forty or more farmers within the IRW.[1] Besides not being before the Court as litigants,

[1] Depending on their particular need, Plaintiffs have alleged and asserted that the independent farmers who contract with Peterson are Peterson's agents and/or employees. Peterson has denied and continues to deny these allegations. The farmers who contract with Peterson to raise poultry, whether in the IRW or elsewhere, are—and have always been—independent contractors who, under their contracts, own the poultry litter which is the subject of Plaintiffs' lawsuit. Accordingly, none of the arguments or positions taken herein change Peterson's long-held and unwavering position on these issues.

these farmers' use and handling of poultry litter, all of which is governed by their state's respective laws and regulations, differs from farmer to farmer with some of the litter being transferred to ranching operations having no connection to the Defendants. The extant case law clearly requires Plaintiffs to prove a causal connection between the alleged contamination and the named Defendants' alleged conduct and, based on the allegations in this case, the conduct of the hundreds of independent farmers and ranchers throughout the IRW who beneficially use poultry litter in their agricultural operations.

Of little surprise, Plaintiffs have failed to establish these numerous causal chains, whether because of the fanciful position taken in Plaintiffs' Motion or otherwise.[2] Instead, Plaintiffs rely almost exclusively on the unsupported, conclusory opinions tailored by their experts under the direction and control of Plaintiffs' contract attorneys while providing virtually no direct or circumstantial proof that Peterson or the forty-plus farmers who contract with it to raise poultry in the IRW contributed to the condition alleged in Plaintiffs' Motion.

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[2] Despite the allegations and the lack of competent evidence supporting them, Plaintiffs' Motion is internally inconsistent. For example, Plaintiffs allege that the pathogenic bacteria purportedly found in poultry litter and the waters of the IRW are a threat to public health. However, Plaintiffs also contend that, if poultry litter (along with the pathogenic bacteria it purportedly contains) is transported 100 miles to a neighboring watershed, the poultry litter (along with the pathogenic bacteria it purportedly contains) can be safely land applied, thereby eliminating the alleged "imminent and substantial endangerment" to public health. *See* Plaintiffs' Motion at 28 ("If all Defendants were to transport their poultry waste 100 miles (*i.e.*, out of the IRW), the effect at the retail level to consumers . . . is estimated to be only one or two pennies per year per person for all poultry consumed. . . . There can be no disputing that this is an extraordinarily small price to pay in return for eliminating the serious human health hazard created by Defendants' practices."). While Peterson denies the allegations in Plaintiffs' Motion, Plaintiffs' contention nonetheless contains a logical disconnect, failing to explain how the purported health risk is eliminated by merely transporting the poultry litter (along with the pathogenic bacteria it purportedly contains) elsewhere. This obvious defect in reasoning suggests, if not conclusively confirms, that Plaintiffs' Motion is without merit.

Moreover, at every opportunity throughout the course of these proceedings, inclusive of Plaintiffs' Motion, Plaintiffs have attempted to shift their burden of proof to Peterson and the other Defendants, seemingly prosecuting their case on the premise that alternative liability principles are applicable in this case. However, under an alternative theory of liability, which has not been shown to be an actionable theory in this Circuit, the plaintiff must be completely innocent before a court will shift the burden to the defendants to disprove causation. Plaintiffs' conduct and interests within the IRW make this an unachievable burden to satisfy in this matter were the theory available here. Nevertheless, were Plaintiffs able to overcome this impossibility, the extant case law requires that all potential contributors to the alleged harm be brought before the court before defendants are required to disprove causation under an alternative theory of liability. Plaintiffs admittedly have not sought relief against all potential sources of the alleged harm identified in Plaintiffs' Motion.

Accordingly, for these reasons, which are discussed in further detail below, and those contained in Defendants' Memorandum, Plaintiffs' Motion for Preliminary Injunction fails to satisfy the numerous burdens required of Plaintiffs before they may seek to disrupt the status quo and the long-practiced agricultural use of poultry litter as an economical and effective fertilizer and soil amendment. As such, Plaintiffs' Motion should be denied.

II. ARGUMENT AND AUTHORITY

A. Plaintiffs bear a heightened burden of proof on the claims made in their Motion for Preliminary Injunction.

As noted above, Plaintiffs cannot sustain the burden required of them to achieve the relief sought in Plaintiffs' Motion. As an initial matter, in order for Plaintiffs to

prevail on their request for a preliminary injunction, they must establish the following as a threshold matter:

> (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.

Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001). Moreover, Plaintiffs must meet a heightened burden on each of the aforementioned elements if they seek, as they unquestionably do, a "(1) preliminary injunction that alters the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004).

As explained at length in Defendants' Memorandum, the RCRA-based relief sought in Plaintiffs' Motion would drastically impact, if not eliminate, the longstanding agricultural use of poultry litter and animal manures as fertilizers and soil amendments throughout the IRW, Oklahoma and beyond, transforming RCRA into something never intended by Congress or the United States Environmental Protection Agency. *See*, *e.g.*, H.R. Rep. No. 94-1491, 94th Cong., 2d Sess., at 2, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240 (Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.); 44 Fed. Reg. 52,438, 53,440 (Sept. 13, 1979) ("the House Report . . . explicitly indicates that agricultural wastes returned to the soil are not subject to [RCRA]."); 44 Fed. Reg. 58,946, 58,955 (Dec. 18, 1978) (explaining the agricultural exclusion in the EPA regulatory definition of solid waste "because the need for such an exclusion is so clearly identified

in RCRA's legislative history"). As such, despite the weak contention in their Motion to the contrary, Plaintiffs cannot reasonably deny that their attempt to expand the reach of RCRA to bring in materials specifically excluded by both Congress and the EPA alters the *status quo*, thereby subjecting them to the heightened burden required by the *O Cento* opinion. *Cf. Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1171 (D. Wyo. 1998) ("Injunctions that disturb the status quo, by requiring some positive act, are denominated *mandatory injunctions*" (emphasis added)).

Because they must make a "strong showing" that they have "a substantial likelihood of success on the merits," Plaintiffs, therefore, must prove the RCRA citizen suit requirements found in 42 U.S.C. § 6972(a)(1)(B), assuming for the sake of argument only that RCRA applies to the agricultural practice at issue, to wit:

> Parsing the language of § 6972(a)(1)(B), we find it contains essentially three elements. To prevail on a "contributing to" claim, a plaintiff is required under § 6972(a)(1)(B) to demonstrate: (1) that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.

Cox v. City of Dallas, 256 F.3d 281, 292 (5th Cir. 2001); *see also Burlington Northern & Santa Fe Rwy. Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007). Peterson's instant Response is limited to the sole issue of Plaintiffs' failure to sustain their causation burden, hereby adopting Defendants' Memorandum as to all other issues, inclusive of any additional arguments regarding Plaintiffs' causation burden.

B. Plaintiffs have not establish the causation element of their RCRA claim with sufficient, competent evidence

Of particular note, Defendants' Memorandum establishes that Plaintiffs' Motion for Preliminary Injunction fails long before reaching the causation element of their RCRA claim because, among other reasons, RCRA does not apply to the agricultural use of poultry litter as a fertilizer and soil amendment. *See* H.R. Rep. No. 94-1491, 94th Cong., 2d Sess., at 2, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. In any event, assuming for sake of argument that RCRA applies here, Plaintiffs' heightened burden under the RCRA citizen suit provision outlined by the *Cox* court requires them to establish a causal link between each Defendant (and each alleged "contributor") and the putative, but nonexistent, "imminent and substantial endangerment" alleged in Plaintiffs' Motion. *See Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 256 (S.D.N.Y. 1999) (stating "some level of causation between the contamination and the party to be held liable must be established"); *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1162-63 (D. Wyo. 1998); *cf. New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 16 F. Supp. 2d 460, 469 (D.N.J. 1998) (noting that, in context of CERCLA, "it is not enough that [plaintiff] simply prove that each Generator Defendant produced [the contaminant] and that [the contaminant] was found at each of the sites in question and ask the trier of fact to supply the link"). In other words, before they are entitled to enjoin the agricultural practices of the forty-plus farmers who grow poultry for Peterson within the IRW, Plaintiffs must establish a causal link between each, individual farm and the alleged public health risk.

Furthermore, on the causation element, at lease one court has "found that 'compliance (or non-compliance) with federal or state environmental standards is a *determinative factor* in assessing whether a particular form of contamination presents the

possibility of imminent or substantial endangerment.'" *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 188 F. Supp. 2d 486, 503 (D. N.J. 2002) (citing 3 S. COOKE, THE LAW OF HAZARDOUS WASTE § 15.01[3][e], at 15-11, 15-12 (2001)) (emphasis added). Finally, the causation element of the RCRA citizen suit provision applies both where there are multiple defendants, as in this case, and where there are multiple locations which have been contaminated, as has been alleged in this case. *See, e.*g., *Wilson*, 989 F. Supp. at 1162-63 (addressing causation in context of multiple defendants and multiple sites); *In re Voluntary Purchasing Groups, Inc.*, 2002 WL 31431652, *3 (N.D. Tex. 2002) (same).

The application of the citizen suit causation standard in a multiple defendant/multiple site lawsuit is illustrated by *Wilson v. Amoco Corp.*, 989 F. Supp. 1159. 1162-63 (D. Wyo. 1998). Indeed, with regard to Plaintiffs' "myriad of daunting causation hurdles," *Wilson*, 989 F. Supp. at 1180, the material circumstances in the *Wilson* case parallel those present in Plaintiffs' lawsuit. For instance, the plaintiffs in *Wilson* sought injunctive relief by way of the citizen suit provision of RCRA against several separate and distinct defendants: Amoco Corp., Burlington Northern Railroad and Steiner Corp. *Id.* at 1162-63. The plaintiffs sought a mandatory preliminary injunction against each of the defendants requiring them to contain discharges and remediate the contaminated property located at separate locations. *Id.* at 1163. Notably, the *Wilson* court engaged in separate causation inquiries for each defendant at each site.

The evidence before the *Wilson* court showed that Amoco owned and operated a refinery and tank farm in Casper, Wyoming. *Id.* at 1163. A substantial amount of contamination existed underneath and around the Amoco facility. *Id.* With respect to the

contaminants found outside the boundaries of the Amoco facility, the plaintiffs alleged that the other defendants contributed to the contamination. *Id.* at 1167-69. The court found sufficient evidence to grant plaintiff injunctive relief as to the Amoco refinery and tank farm because the plaintiff established that the wastes associated with the facility had contributed to the contamination of the groundwater. *Id.* at 1174-75, 1179.

However, with respect to a former Amoco service station located at a different site, the court found an insufficient causal link between that site and the alleged harm, to wit:

> The Court agrees that there is a host of contaminants underneath the former Amoco service station. Nonetheless, the evidence presented at the hearing was not sufficiently heavy and compelling to attribute that contamination to Amoco or establish that the contamination poses an imminent and substantial endangerment to health or the environment.

Id. at 1180. The court further noted that "several former and current service stations upgradient of the Amoco service station may be equally responsible for the hydrocarbon contamination." *Id*. Thus, the plaintiffs having failed to establish a causal link between the contamination beneath the service station site and Amoco, the *Wilson* court—contrary to the result Plaintiffs urge here under analogous circumstances—denied the plaintiffs' requested injunctive relief as to the site. *Id*.

Burlington Northern owned another one of the other alleged contaminated sites in Casper. With respect to this separate site the *Wilson* court observed as follows:

> As noted, the BN property contamination includes, but is not limited to, diesel, hydrocarbons, PCE, and a host of other contaminants. Only the diesel fuel, a non-hazardous waste, has been shown with any certainty to be attributable to BN. . . . Nonetheless, application of the much harsher evidentiary standard imposed on Plaintiffs at the preliminary injunction stage permits the inference only that BN has released diesel fuel that has impacted the soil and groundwater under the BN property.

Id. In other words, the plaintiffs had not sufficiently established a causal link between Burlington Northern and the other contaminants, notwithstanding that the other contaminants were present at the site. The *Wilson* court, thus, declined to enjoin Burlington Northern under the RCRA citizen suit provision. *Id*.

Steiner Corp., a dry-cleaning operation, owned the final, separate property. With respect to Steiner Corp., the court observed:

> Plaintiffs face similar causation difficulties with respect to their RCRA claim against Steiner. A 1994 report prepared for the WDEQ by Huntington Engineering and Environmental, Inc., identified 17 potential sources of the PCE contamination attributed by Plaintiffs to Steiner. These sources include Steiner, its predecessor Troy Laundry, Burlington Northern, a landfill, a fuel distributorship, and an auto body shop. Dr. Jeremiah Jackson, an engineer retained by Steiner, identified these same potential sources and a host of others. *Given the indetermination as to the degree and extent to which Steiner contributed to the plume, the Court will not at this time enjoin Steiner*.
>
> It does not follow from this finding that Steiner is not a potential or even significant source of the PCE contamination. To the contrary, the Coe and McHattie affidavits evidence strongly Steiner's haphazard and consciously inappropriate disposal and handling of PCE infected substances. The Court is nonetheless reluctant to prematurely impose on Steiner the considerable burden of investigating and remediating a plume of contamination for which it almost certainly does not bear sole responsibility.

Id. at 1180 (emphasis added)(internal citations omitted). The *Wilson* court went on the comment that, besides these "myriad of daunting causation hurdles," the plaintiffs also bore the "equally troublesome" burden of establishing that Steiner's purported contribution satisfied the "imminent and substantial endangerment" prong of their request for injunctive relief. *Id*.

In short, the *Wilson* opinion illustrates that, with regard to each defendant *and* each purported source-site of contamination, the plaintiff seeking injunctive relief under

42 U.S.C. § 6972(a)(1)(B) *must* demonstrate the requisite causal link as to each defendant and each site. On the flipside, the plaintiff in a RCRA citizen suit cannot, as Plaintiffs have in this matter, simply rely on a blanket allegation that the defendants, as an undifferentiated whole, contributed to the alleged harm simply because the alleged contaminant is found in two distinct locations without competent evidence connecting them. Accordingly, under the RCRA standard explained in *Wilson*, causation has not been established in this case with regard to Peterson's contract growers simply because Plaintiffs have purportedly identified bacteria in both poultry litter and the waters of the IRW.

The opinion in *In re Voluntary Purchasing Groups, Inc.*, 2002 WL 31431652 (N.D. Tex. 2002), is also illustrative of Plaintiffs' burden to establish causation under its RCRA claim here. In this case, the plaintiffs alleged that multiple railroad defendants were liable under RCRA "as generators and transporters of waste, because they transported raw arsenic to the Commerce plant and allowed it to leak into the environment there" which led to the contamination of the separate Ridgeway site. In a summary judgment proceeding, the court ultimately decided that the evidence presented regarding the defendants' alleged contribution to the waste at the Commerce plant was insufficient to causally link it to the pollution at the Ridgeway site. Specifically, the court found:

> As discussed above, Plaintiffs provide summary judgment evidence that Railroads contributed to the creation of hazardous waste at the Commerce site. They provide no such evidence for the proposition that the Railroads contributed to the disposal of the arsenic at Ridgeway. Evidence of the spillage of arsenic at Commerce, of the inadequacy of Defendants' warnings regarding arsenic, and of Defendants' handling of the arsenic at Commerce does not further their case regarding Ridgeway.

> . . . . In light of this, the Court holds that the Plaintiffs must establish some level of causation between the Defendant and the contamination to prevail in a "contributing to" cause of action under RCRA.
>
> Absent competent summary judgment evidence by the Plaintiffs of a causal link between Railroads' actions at Commerce and the contamination of the Ridgeway site, summary judgment for the Defendants on their liability under RCRA is warranted.

Id. at *6-7. In other words, the plaintiffs had failed to show the alleged fate and transport of arsenic from the Commerce site to the Ridgeway site, notwithstanding the presence of the substance at both locations, thereby resulting in the court's dismissal of the RCRA citizen suit.

In the instant case, Plaintiffs have failed to establish the causation element of their RCRA claim with evidence sufficient to warrant the mandatory injunction they seek of the agricultural operations of forty or more farms who contract with Peterson. Instead, Plaintiffs allege that they have found bacteria in poultry litter, and they have found bacteria in the waters of the IRW. Based on this putative evidence, Plaintiffs ask the Court to supply the missing links between the two necessary to enjoin the agricultural activities and operations of the farmers in the IRW.

As previously discussed, Peterson currently contracts with over forty different farmers at various locations throughout the IRW, all of whose operations Plaintiffs seek to disrupt with their requested *mandatory* injunction. However, in response to Peterson's recent discovery requests served on Plaintiffs directed at the issues raised in their Motion, Plaintiffs concede that they do not possess "an individual piece" of direct evidence to support their claims against Peterson that: (1) the land application of poultry litter has caused bacterial contamination of any surface water located within the IRW; or (2) the land application of poultry litter has caused bacterial contamination of any groundwater

within the IRW. (*See* State of Oklahoma's Response to Peterson Farms, Inc.'s December 21, 2007 Requests for Admissions and Interrogatories to Plaintiffs at 4-5, attached hereto as Exhibit "1").

Instead, in qualifying their admission of Peterson's Requests for Admission, Plaintiffs contend they have "representative information" comprised of evidence and expert opinions that will purportedly support the following contentions:

> [1] [T]he State has direct evidence that runoff from land upon which Defendant Peterson Farms' Poultry Waste was applied contained Fecal Bacteria. The State also has direct evidence that surface waters in the IRW are contaminated by Fecal Bacteria from Poultry Waste. (Exhibit "1" at 5).
>
> [2] [T]the State has direct evidence that runoff from land upon which Defendant Peterson Farms' Poultry Waste was applied contained Fecal Bacteria. The State also has direct evidence that Fecal Bacteria from Poultry Waste has contaminated groundwater in the IRW. (Exhibit "1" at 7).

When asked for this purported "direct evidence" supporting these contentions, Plaintiffs' Interrogatory responses refer Peterson to their expert witnesses (relying *primarily* on the opinions of J. Berton Fisher, Ph.D.) and a single, purported litter application at the farm of Waymon Rhodes, who is one of the independent poultry producers under contract with Peterson in the IRW.[3] Plaintiffs describe the litter application event as follows:

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[3] Plaintiffs' Interrogatory responses also reference the following:

> W.A. Saunders, a Peterson Farms contract grower, has land applied poultry litter. . . . The State identifies the following soil and waste samples from Peterson contract growers for which Peterson Farms is legally responsible: Bates Range STOK 16532-16534, Soil Sampling Plans, Areial Photos LAL7 Pigeon, STOK 16502-16505, Soil Sampling Plans, Aerial Photos LAL15 Saunders. (Exhibit "1" at 18).

(fn. 3 cont. next page)

> [1] [T]he State identifies the following specific instance of land application of poultry waste by a Peterson Farms contract grower: The Wayman [*sic*] Rhodes Farm . . . was observed land applying poultry waste from the Wayman [*sic*] Rhodes Farm on open fields east and west of County Road 298. (Exhibit "1" at 10).
>
> [2] [T]he State identifies the following specific instance where Fecal Bacteria has been detected in the IRW: After observing the land application of Poultry Waste by the Wayman [*sic*] Rhodes farm (April 11, 2007) on the fields described above a rainfall event occurred. On April, [*sic*] 24, 2007, a sample of field water runoff . . . was collected . . . ; and the edge of field sample was analyzed and found to contain Fecal Bacteria. (Exhibit "1" at 11).

Clearly, this purported evidence is insufficient to satisfy Plaintiffs' causation burden with regard to the putative "imminent and substantial endangerment" existing in the waters of the IRW.

Presumably, based on Plaintiffs' representations regarding their "direct evidence" that Mr. Rhodes contributed to the alleged public health risk in the IRW and their reference in the Interrogatory response to their expert witnesses, these experts would be prepared to close the obvious and gaping gap that exists between Mr. Rhodes' field and any alleged bacteria found in the waters of the IRW. However, when pressed on this issue, Plaintiffs' experts have, without fail, conceded that they did not and/or cannot trace the sample from Mr. Rhodes' field (or the field of any other farmers, whether a poultry grower or not) to the waters of the IRW.

However, the referenced Bates numbered documents are aerial photographs purporting to be the farms of Mr. Saunders and Mr. Pigeon without any support for the proposition that litter was spread on any field or that any field depicted was an alleged source of any substance giving rise to the putative "imminent and substantial endangerment" to human health alleged by Plaintiffs. Furthermore, Mr. Saunders terminated his contract with Peterson in 2007, and he now grows poultry under contract with another poultry integrator named in this lawsuit. Mr. Pigeon has not been under contract with Peterson since approximately 2004; he, too, is currently under contract with another integrator.

For instance, J. Berton Fisher, Ph.D. testified as follows with regard to the alleged litter application at the Rhodes' farm:

> Q What harm resulted from that edge of field runoff, Dr. Fisher?
>
> MR. PAGE: Object to the form.
>
> A Bacteria entered surface waters.
>
> Q What surface water?
>
> A A drainage way that would lead to a bit larger drainage ways.
>
> **Q Well, where did -- did you in fact trace that edge of field runoff into a recognized stream?**
>
> A That particular parcel of edge of field runoff?
>
> Q Yes, sir.
>
> **A No.**
>
> . . . .
>
> Q All right. Let's not debate that point. The -- has the State to your knowledge done anything to trace the bacteria in that edge of field runoff to any waters of the state?
>
> A I don't know.
>
> **Q And based upon your answer, that's the only circumstance you can cite that is responsive to the interrogatory I questioned you –**
>
> MR. PAGE: Object to the form.
>
> **A That's the only one [*i.e.*, Mr. Rhodes] I was aware of when that question was posed to me.**

(Deposition of J. Berton Fisher of 01/23/2008, at pp. 266, 268, attached hereto as Exhibit "2" (bold type added)). Similarly, Valerie Harwood testified that her purported "biomarker" cannot be used to trace any particular substance to any particular farm or field. (Deposition of Valerie Harwood of 01/29/2008, at pp. 297-98, attached hereto as

Exhibit "3"). Roger Olsen also testified that he did not identify any particular source of alleged bacterial contamination, *i.e.*, poultry litter, to any farm or field with a reasonable degree of scientific certainty. (Deposition of Roger Olsen of 02/02/2008, at pp. 11-12, attached hereto as Exhibit "4"). Finally, Christopher Teaf testified that he had not been requested to trace bacteria to any particular source. (Deposition of Christopher Teaf of 01/31/2008, at pp. 247-48, attached hereto as Exhibit "5").

Furthermore, Plaintiffs have also failed to establish yet another "determinative factor," as noted by the *Interfaith* court, *supra*, demonstrating that the farmers under contract with Peterson, whose actions and operations Plaintiffs seek to enjoin, have violated any state or federal environmental regulation or law. Indeed, the evidence developed on this point suggests that the farmers are and have been, as general rule, complying with the applicable laws and regulations which govern their beneficial use and land application of poultry litter within the IRW.

For instance, during the deposition of several ODAFF representatives, the undeniable consensus has been that the farmers in the IRW are generally in compliance with the applicable laws and regulations which govern their use of poultry litter as a fertilizer and soil amendment. (*See, e.g.*, Deposition of Terry Peach of 04/18/2006 at p. 65, attached hereto as Exhibit "6"; Deposition of Dan Parrish of 01/14/2008 at 258-59, attached hereto as Exhibit "7"; Deposition of David Berry of 08/29/2007 at 249-50, attached hereto as Exhibit "8"; Deposition of John Littlefield of 08/02/2007 at 141-42, attached hereto as Exhibit "9").[4] As such, Plaintiffs have failed yet another

[4] Despite this lack of evidence and General Edmondson's public comments in the media, press releases and elsewhere that he is not suing the farmers or seeking to harm them through this lawsuit, Plaintiffs' now concede that they, indeed, consider the farmers who

"determinative factor" in the RCRA causal chain which might otherwise allow the Court to enjoin the independent operations of the approximately forty farmers in the IRW who contract with Peterson to raise poultry.

In summary, Plaintiffs' purported "direct evidence" is, at best, a series of conclusory, self-serving assumption left un-validated by field observation or otherwise, burdening the Court with the task of finding the causal link now filled with Plaintiffs' conjecture. Whether in regard to Mr. Rhodes or the other independent farmers in the IRW, Plaintiffs' causation burden, however, should be borne neither by the Court nor Peterson. Clearly, measured against the causation burden described in the *Wilson* and *Voluntary Purchasing* cases, Plaintiffs have failed to satisfy their burden against Peterson under the RCRA citizen suit provision that it contributed to the alleged public health risk in the IRW. Accordingly, Plaintiffs' Motion for Preliminary Injunction should be denied in its entirety.

C. Plaintiffs cannot shift their burden of proof on causation to Peterson using an "alternative liability" theory

Despite their causation burden, Plaintiffs' wholesale lack of specific direct or circumstantial proof regarding each Defendant and each site suggests and gives the appearance that, for purposes of the requested injunctive relief and otherwise, they are pursuing a theory of "alternative liability" in which the burden of proof regarding causation is shifted to Peterson and the other Defendants to prove that they did not

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use poultry litter as a fertilizer and soil amendment to be "polluters" within the IRW. Indeed, Plaintiffs' expert, Gordon Johnson, exclaimed at his deposition that he would testify on behalf of General Edmondson and Secretary Tolbert that the farmers in the IRW who use poultry litter in their agricultural operations are "polluters." (Deposition of Gordon Johnson of 02/04/2008, at 8, attached hereto as Exhibit "10").

contribute to the alleged bacterial contamination of the IRW.[5] Peterson does not concede that the alternative liability theory is available to Plaintiffs in this Circuit, but were the Court to find it applicable, Plaintiffs cannot "attempt[] to operate under the lenient causation standard available under the alternative liability theory without fully complying with its procedural preconditions," which are numerous. *Aurora Nat. Bank v. Tri Star Marketing, Inc.*, 990 F. Supp. 1020,1031 (N.D. Ill. 1998). As discussed below, Plaintiffs have not and cannot comply with these procedural preconditions.

As an initial matter, application of the alternative liability theory is limited to specific circumstances not present in this case. *Black's Law Dictionary* defines "alternative liability" as:

> Liability arising from the tortious acts of two or more parties – when the plaintiff proves that one of the defendants has caused harm but cannot prove which one caused it – resulting in a shifting of the burden of proof to each defendant. Restatement (Second) of Torts § 433B(3) (1965).

Comment (f) to § 433B of the *Restatement (Second) of Torts* provides, however, that any injury inflicted be upon an "entirely innocent plaintiff," which, of course, is not the case here. The court in *Zands v. Nelson*, 797 F. Supp. 805, 814 (S.D. Cal. 1992), a RCRA citizen-suit action, echoed the "innocent plaintiff" requirement if alternative liability is sought.

Specifically, when pursuing a case under an alternative liability theory, the court required the plaintiff to prove "(1) that the plaintiffs did not cause the contamination and (2) their [plaintiffs'] prima facie case," including the causation element (*i.e.*, the causation burden discussed, *supra*, in Part II.B), before the causation burden could

[5] The language used in Plaintiffs' Motion certainly supports this proposition. For instance, on page 5 of Plaintiffs' Motion, they refer to all Defendants as a homogenous unit with words such as "collectively" and "together" and "its poultry operations."

possibly be shifted to the defendants. *See id.* at 817; *New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 16 F. Supp. 2d 460, 470 (D.N.J. 1998) (discussing alternative liability in context of CERCLA); *see also Aurora Nat. Bank*, 990 F. Supp. at 1032 (noting that § 6972(a)(1)(B) applies retroactively to persons who have contributed to alleged contamination in the past).

Even were Plaintiffs "entirely innocent," which they are not, they cannot cure the additional defects in their RCRA citizen suit, prohibiting them from pursuing their injunction as an alternative liability case. In addition to establishing their own "innocence" for the alleged contamination of the IRW, Plaintiffs must also establish the following alternative liability elements:

> (1) all defendants must have acted tortiously, (2) plaintiff must have been harmed by the conduct of at least one of the defendants, and *therefore plaintiff must bring all possible defendants before the court*; and (3) plaintiff must be unable to identify which defendant caused the injury.

Zands, 797 F. Supp. at 813 (emphasis added). Notably, the court commented that a plaintiff's failure to join all possible defendants is the most frequently cited factor for disallowing a plaintiff to proceed on alternative liability theories. *See id.*; *see also Aurora Nat. Bank*, 990 F. Supp. at 1028-30.

In the instant case, Plaintiffs have not and cannot satisfy the procedural hurdles required in an alternative liability case. First, as discussed at length above in Part II.B, Plaintiffs have not established a prima facie case against Peterson. As such, were the Plaintiffs allowed to prosecute their lawsuit as an alternative liability case, Plaintiffs' Motion would nonetheless fail on this initial burden.

Second, Plaintiffs—who purport to represent the entire State of Oklahoma—are not "entirely innocent" parties, because they have contributed to the past and,

potentially, present alleged contamination of the IRW. By way of example, the Oklahoma Department of Tourism and Recreation has previously entered an Administrative Compliance Order ("ACO") with the Oklahoma Department of Environmental Quality ("ODEQ") for failures in the wastewater treatment facilities at Tenkiller State Park. (Administrative Compliance Order, dated June 24, 2002, at ¶ 31, OKTRD0000196, attached hereto as Exhibit "11"). As determined by the ODEQ in the ACO, these treatment facility failures "*posed a serious environmental threat from fecal contamination of the lake*." (Exhibit "11" at ¶ 31 (emphasis added)).

Similarly, Plaintiffs' expert, Lowell Caneday, revealed that, besides the wastewater issues at Tenkiller, other state parks in the IRW have the potential to contribute bacteria from their respective wastewater treatment facilities, because many of the parks' systems exceed their carrying capacities. (Deposition of Lowell Caneday of 02/05/2008, at pp. 94-98, attached hereto as Exhibit "12"). Dr. Caneday also testified that some of the toilet facilities the Oklahoma Scenic Rivers Commission installed on the Illinois River were "inadequate" and "were located in some bad locations," (Exhibit "12" at pp. 103-05), creating a possible source of bacterial contamination under certain circumstances. As such, the State of Oklahoma is not "entirely innocent" with regard to the allegations in Plaintiffs' Motion, thereby preventing Plaintiffs from employing an alternative liability theory in this matter were it available to them.

Third, even were Plaintiffs not an actual and potential cause of bacterial pollution, they have failed to bring all possible sources of such alleged contamination before the Court. Indeed, "[t]he attorney general has *never* claimed that poultry waste is the only source of pollution" in the IRW. (Oklahoma Attorney General News Release,

dated 06/13/2005, attached hereto as Exhibit "13" (emphasis added)). Other officials with the State of Oklahoma confirm that multiple sources of bacterial contamination exist within the IRW, to wit: wildlife, cattle, recreation, open sewers, septic systems, urban runoff, raw sewage overflow from municipal WWTPs, normal flow from municipal WWTPs, and pets, among other sources. (Deposition of Shanon Phillips of 01/17/2008, at pp. 44-51, 57-61, 65, attached hereto as Exhibit "14").

Yet, Plaintiffs have not brought these other numerous other potential defendants before the Court, whether they be municipalities, river concessionaries, landowners with septic systems or any other potential source of bacterial contamination. Thus, again, Plaintiffs' failure to satisfy this procedural prerequisite prevents them from establishing their RCRA claim under an alternative liability theory, assuming for the sake of argument the theory is valid in this instance. As such, Plaintiffs' Motion should be dismissed for these additional reasons.

III. CONCLUSION

Plaintiffs' Motion requests that the Court enjoin Peterson and the forty-plus farmers in the IRW who contract with Peterson to raise poultry from beneficially using poultry litter in their agricultural operations, because such activities purportedly create an "imminent and substantial endangerment" to human health within the IRW. However, before the Court can possibly enjoin the lawful activities of these farmers, Plaintiffs must establish a continuous causal link between each of the operations and the alleged public health risk which they allege exists in the IRW, assuming, of course, that RCRA has any application in this matter.

As shown above, Plaintiffs cannot establish this connection without asking the Court to supply a link between the beneficial use of poultry litter and the alleged bacterial contamination of the waters of the IRW, and Plaintiff effectively concede this point. Plaintiffs have not, by their own admission and that of their experts, traced any alleged contamination from any farm in the IRW to any waterbody in the IRW. Moreover, Plaintiffs have not demonstrated that each of the farmers in the IRW has violated the laws and regulations that govern their use of poultry litter. Furthermore, Plaintiffs, who cannot reasonably claim to be "innocent" parties for purposes of this lawsuit, have not brought all potential defendants before the Court, preventing them from using a less demanding alternative liability theory in these proceedings were the Court to determine that the theory is available to Plaintiffs in this case.

In short, Plaintiffs have not carried their burden as to the causation element of their RCRA citizen suit claim, whether against Peterson or any other named Defendant. As such, Plaintiffs' Motion for Preliminary Injunction should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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